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ORIGINAL

March 29, 2000

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
12th Street Lobby
Washington, D.C. 20554

Re: **Ex Parte Notification**
DTV Carriage Rules (CS Docket No. 98-120)

Dear Ms. Roman Salas:

The Association for Maximum Service Television, Inc. ("MSTV"), hereby notifies the Commission that yesterday, Victor Tawil, Senior Vice President, and Jonathan Blake and Ellen Goodman, counsel, for MSTV met with Kathy Brown, Chief of Staff, and Tom Power, Legal Advisor, of Chairman Kennard's office to discuss the above-captioned docket. MSTV reviewed positions that are reflected in written material on file in this docket. In addition, MSTV covered the attached slides.

Any questions should be addressed to the undersigned.

Sincerely yours,



Ellen P. Goodman

cc. Kathy Brown, Esq.
Tom Power, Esq.

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DTV Cable Carriage

Statutory and Judicial Background

MSTV Presentation 3/00

Must Carry Background

- **1972: must carry rules respond to maturing cable industry; quid pro quo for compulsory copyright**
- **1984: comprehensive rules struck down because insufficient record of harm**
- **Congress acted in 1992 in face of overwhelming evidence of harm to broadcasters and public (30,000 page record)**

1992 Cable Act

- **Vertical and horizontal integration give cable ability and incentive to exclude TV: refused to carry at least 19% of all stations and 39% of all UHF independents**
- **Cable must not exercise gatekeeping power to control subscriber access**
- **Subscribers will not circumvent cable to receive signals over the air**

1992 Cable Act

- **FCC had issued 2nd R&O establishing framework for assigning 2nd channels for a 15 yr. Transition**
- **Section 614(b)(4)(B): when FCC “prescribes modifications of the standards for TV broadcast signals the FCC shall initiate a proceeding to establish any changes” in must carry rules “to ensure cable carriage of such broadcast signals”**

Turner

Government has substantial interest:

- **preserve benefit of free, over-the-air, local television *system***
- **promoting multiplicity of voices**
- **promote fair competition in market**

**Court will accord substantial
deference to predictive means/ends
judgement of Congress**

Turner

- **Burden on cable is acceptable:**
 - **99.8% of cable programming nationwide continued to be carried**
 - **only 1.18 % of all cable channels was dedicated to must carry**
 - **capacity increases would ease burden**

Need for DTV Must Carry

- **More vertical and horizontal integration**
- **Greater cable penetration**
- **Start-up, not established, TV service**
- **Incentives to corner digital market**
- **DTV transition**

DTV Carriage Burden

- **Cable increasing capacity much faster than predicted in the mid-1990's**
- **In 1992, broadcast use was 7.2% - 12% of capacity; in 2006 (assuming full DTV must carry), it would be 2.2% - 3.4% of capacity**
- **MSTV's capacity-based proposal ensures burden is reasonable**

FCC's Authority for DTV Must Carry

1992 Cable Act Section 614(b)(4)(b):

**The most natural reading is that rules
should be adopted to ensure
carriage of DTV signals as they go
on the air, not at the end of
transition**

FCC's Authority for DTV Must Carry

Senate Comte. Report:

**When the FCC adopts a new standard
“such as the authorization of
broadcast HDTV, it shall conduct a
proceeding . . . To ensure that cable
systems will carry television signals
complying with such modified
standards”**

FCC's Authority for DTV Must Carry

1996 Telecom Act

Conf. Report Section 336(b)(3):

**This section does not determine the
must carry status of DTV signals.**

**“Under the 1992 Cable Act, that
issue is to be the subject of a
Commission proceeding.”**

FCC's Authority for DTV Must Carry

- **1996 Telecom Act Section
336(b)(5):**

**FCC shall “prescribe such other
regulation as may be necessary for
the protection of the public
interest, convenience and
necessity.”**

FCC's Authority for DTV Must Carry

1997 Balanced Budget Act

Conf. Report Section

309(j)(14)(B)(iii)(I):

This section does not “define the scope of any MVPD’s ‘must carry’ obligations for [DTV] . . . The conferees are leaving that decision for the Commission to make at some point in the future.”

Arguments Against DTV Must Carry Now

- **The FCC lacks the authority. *Congress has expressly given and implicitly affirmed authority.***
- **The FCC must build record. *The record is established; judicial deference to FCC's predictive judgement.***
- **The market will take care of it. *It is not.***
- **Wait until the end of the transition. *Too late or never.***
- **Wait until DTV plans emerge. *Irrelevant and impermissible criterion.***